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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

BERTRAND E. ALBERT,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Four

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C. §§ 51-60 (1908, AS AMENDED), CONTAIN A "ONE FREE HEART ATTACK" EXEMPTION?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED 2

STATEMENT 2

A. FACTS 2

B. PROCEDURAL HISTORY 6

REASONS FOR GRANTING THE PETITION 7

I. THIS CALIFORNIA STATE COURT OPINION, AMONG OTHERS, CREATES A BASELESS JUDICIAL EXEMPTION TO THE CLEAR LANGUAGE OF THE FELA 8

II. THIS SOLE PUBLISHED CALIFORNIA STATE COURT OPINION CONFLICTS WITH OTHER FEDERAL AND STATE OPINIONS BASED ON SIMILAR FACTS 12

III. THIS PUBLISHED CALIFORNIA STATE COURT OPINION CAN AND SHOULD BE SUMMARILY REVERSED PER CURIAM 16

CONCLUSION 16

APPENDIX

Index to Appendix ..... ia

TABLE OF AUTHORITIES

Page

CASES:

Affolder v. New York, Chicago & St. Louis Railroad Co., 339 U.S. 96 (1950) 3

Atchison, Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987) 8

Bailey v. Central Vermont Railway Co., 319 U.S. 350 (1943) 8

Bailey v. Missouri Pacific Railroad Co., 383 So. 2d 397 (La. App.) *cert. denied*, 385 So. 2d 784 (La.), *cert. denied*, 449 U.S. 836 (1980) 15

Bashram v. Pennsylvania Railroad Co., 372 U.S. 699 (1963) 3

Consolidated Rail Corp. v. Gottshall, 512 U.S. ___, 114 S.Ct. 2496, 129 L.Ed.2d 427 (1994) 8

Conner v. Butler, 361 U.S. 29 (1959) 16

Creamer v. Odgen Railway, 242 P.2d 575 (Utah 1952), *cert. denied*, 344 U.S. 912 (1953) 11

Davis v. Virginian Railway Co., 361 U.S. 354 (1960) 3

Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957) 11

Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963) 9

Grand Trunk Western Railway v. Lindsay, 232 U.S. 42 (1914) 3

Harbin v. Burlington Northern Railroad Co., 921 F.2d 129 (7th Cir. 1990) 12, 13

Hines v. Consolidated Rail Corp., 926 F.2d 262 (3d Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page

Morrison v. Illinois Central Gulf Railroad Co., 387 So.2d 754 (Miss. 1980) 11

New York, New Haven & Hartford Railroad Co. v. Cragan, 352 F.2d 463 (1st Cir. 1965), *cert. denied*, 386 U.S. 1035 (1967) 11

O'Donnell v. Elgin, Joliet & Eastern Railway Co., 338 U.S. 384 (1949) 3

Owens v. Union Pacific Railroad Co., 319 U.S. 715 (1943) 10

Pedersen v. Delaware, Lackawanna & Western Railway Co., 229 U.S. 146 (1913) 3

Pierce v. Southern Pacific Transportation Co., 823 F.2d 1366 (9th Cir. 1987) 14

Pitt v. Pennsylvania Railroad Co., 66 F. Supp. 443 (E.D. Pa. 1946) *affirmed*, 161 F.2d 733 (3d Cir. 1947) 9, 10

Ringhiser v. Chesapeake & Ohio Railway Co., 354 U.S. 901 (1957) 16

Robert v. Consolidated Rail Corp., 832 F.3d 3 (1st Cir. 1987) 11

Rodriguez v. Delray Connecting Railroad, 473 F.2d 819 (6th Cir. 1973) 9

San Antonio & Arkansas Pass Railway Co. v. Wagner, 241 U.S. 476 (1916) 2

Seaboard Air Line Railway v. Lorick, 243 U.S. 572 (1917) 3, 4

Shenker v. Baltimore & Ohio Railroad Co., 374 U.S. 1 (1963) 3

TABLE OF AUTHORITIES – Continued

Page

Stone v. New York, Chicago & St. Louis Railroad Co., 344 U.S. 407 (1953) 7

Thompson v. Tippit, 300 S.W.2d 351 (Tex. Civ. App. 1957), *cert. dismissed*, 355 U.S. 943 (1958) 11

Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54 (1943) 10

Urie v. Thompson, 337 U.S. 163 (1949) 9

U.S. v. Erie, 237 U.S. 402 (1915) 2

Webb v. Illinois Central Railroad Co., 352 U.S. 512 (1957) 11

Wilkerson v. McCarthy, 336 U.S. 53 (1948) 11

CONSTITUTIONS:

U.S. Const. Art. VI, cl. 2 (1787) 2

U.S. Const. Amend. VII (1791) 2

STATUTES:

28 U.S.C. § 1257 (1988) 2

45 U.S.C. §§ 2 & 13 (1893, as amended) 2

45 U.S.C. § 51 *et seq.* 6

45 U.S.C. § 51 (1908, as amended 1939) 8

45 U.S.C. §§ 51-60 (1908, as amended) 2, 3

45 U.S.C. § 53 (1908) 10

45 U.S.C. § 54 (1908, as amended 1939) 10

45 U.S.C. § 55 (1908) 11

45 U.S.C. § 56 (1908, amended 1948) 8

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY:

40 Cong. Rec. 4605 (1906)..... 12

42 Cong. Rec. 4541 (1908)..... 12

42 Cong. Rec. 4542 (1908)..... 12

42 Cong. Rec. 4550 (1908)..... 12

OTHER AUTHORITIES:

Russell Baker, *Growing Up* (Signet 1982) at 221..... 11

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BERTRAND E. ALBERT,

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v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Four

PETITION FOR WRIT OF CERTIORARI

Bertrand E. Albert respectfully petitions for a writ of certiorari to review and reverse the judgment of the California Court of Appeal, Second Appellate District, Division Four.

OPINIONS AND ORDERS BELOW

The California Supreme Court Order denying review (17a) is unreported. The California Court of Appeal Order denying rehearing (12a) is unreported. The California Court of Appeal, Second Appellate District, Division

Four, affirmance (1a-11a) is reported at 30 Cal. App. 4th 529, 35 Cal. Rptr. 2d 777 (1994). The Los Angeles County Superior Court Judgment (13a) and Order (14a-15a) granting the railroad summary judgment under FELA as against its employee are unreported.

JURISDICTION

The California Supreme Court denied review on February 23, 1995. Jurisdiction is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

Text excerpts of U.S. Const. Art. VI, cl. 2 (1787), U.S. Const. Amend. VII (1791), and the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1908, as amended) are in the Appendix. 18a-20a.

STATEMENT

A. FACTS

The Federal Safety Appliance Act of 1893 prohibits a railroad from hauling a car with a defective automatic coupler if it can be repaired where the defect is discovered. *U.S. v. Erie*, 237 U.S. 402, 409 (1915); 45 U.S.C. §§ 2 & 13 (1893, as amended). Despite that fact, railroads often defer required repairs for a long time. *San Antonio & Arkansas Pass Railway Co. v. Wagner*, 241 U.S. 476 (1916)

(railroad history of poor maintenance practices). Then, the railroads demand that their employees make the required repairs on a rush basis. *Davis v. Virginian Railway Co.*, 361 U.S. 354, 355-356 (1960) ("Railroad employees classified the Ford 'switching operation' as a 'hot job' because 'you do your job a little faster than you would in the yard.' "). As a result, many railroad workers have been killed or maimed attempting to couple or repair defective automatic couplers still in service. *Grand Trunk Western Railway v. Lindsay*, 232 U.S. 42 (1914); *O'Donnell v. Elgin, Joliet & Eastern Railway Co.*, 338 U.S. 384 (1949); *Affolder v. New York, Chicago & St. Louis Railroad Co.*, 339 U.S. 96, 98 (1950).

Repairers of automatic couplers are covered under the FELA. *Pedersen v. Delaware, Lackawanna & Western Railway Co.*, 229 U.S. 146 (1913); *Bashram v. Pennsylvania Railroad Co.*, 372 U.S. 699, 700 (1963); 45 U.S.C. §§ 51-60 (1908, as amended). A railroad's FELA responsibilities to its repairers are nondelegable duties. *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7-8 (1963).

For eighty years railroads have known, as to repairing automatic couplers, that: "To do so it was necessary to raise the coupler; and for this a jack was the appropriate appliance." *Seaboard Air Line Railway v. Lorick*, 243 U.S. 572, 573 (1917). For eighty years railroads have known that, absent a functional hydraulic jack, a repairer will do the job with brute force. *Lorick, supra*, 243 U.S. at 573.

On March 28, 1991, Southern Pacific told its longtime employee, 55.5-year-old Bertrand Albert and an even older employee, Charlie Moten, to repair two extremely worn automatic couplers on a rush basis so that a car

could be returned to interstate service in just a few hours, between 10:30 a.m. and noon that same day. As a Southern Pacific manager, supervisor Jerry Cain testified that the only proper tool for the job was a functional hydraulic jack. *Accord, Lorick, supra,* 243 U.S. at 573.

The sole tool Mr. Albert had was a 16-pound sledgehammer. Starting at 9:30 a.m., as directed by Foreman John Juarez, Mr. Albert alone performed all of the repairs at one end of the car by 10:30 a.m., just one hour later. Starting again at 11:30 a.m., as Foreman Juarez watched impatiently, Mr. Albert alone performed most repairs at the other end by 12:00 p.m., just one-half hour later. Trying to remove the extremely worn-out cross-key from the equally worn-out draft gear of the old automatic coupler, Mr. Albert rapidly swung the 16-pound sledgehammer thirty times in quick succession. Foreman Juarez then ordered a forklift to yank the worn-out old cross-key out of the worn-out old draft gear.

Trying to insert a new cross-key into the worn-out old draft gear, Mr. Albert rapidly swung the 16-pound sledgehammer thirty more times in quick succession. The new cross-key only went halfway into the worn-out old draft gear. Foreman Juarez then ordered a forklift to yank the new cross-key out of the worn-out old draft gear so that a burr caused by the pounding could be ground off the cross-key.

Trying to reinsert the new cross-key into the worn-out old draft gear, Mr. Albert rapidly swung the 16-pound sledgehammer fifteen more times in just twenty-five seconds. The new cross-key went but three-fourths of the way into the worn-out old draft gear.

Feeling very tired and very, very weak, Mr. Albert put down the 16-pound sledgehammer and entered the bathroom. Meanwhile, Foreman Juarez ordered a forklift to push the new cross-key the remaining one-fourth of the way into the worn-out old draft gear. As a Southern Pacific manager, Supervisor Jerry Cain testified:

"Q In your opinion, was that a proper method of trying to pass a cross key?

"A No, sir. . . . . "

Paramedics arrived and took Mr. Albert to a hospital where he first saw Dr. Khan who diagnosed Mr. Albert's first heart attack. As a treating physician and medical expert, Dr. Khan testified:

"Q . . . I am trying to isolate the variable of Mr. Albert's exertion at work. . . .

"A More likely is that he was involved in heavy activity or exertion [at work] and he got symptomatic following that, and most likely that was the timing of his heart attack."

"Q . . . Is it correct, Doctor that it is your belief that the exertion was a substantial factor in bringing about his heart attack?

"A Yes."

"Q . . . Doctor, can you say to a degree of reasonable medical or scientific probability that Mr. Albert's heart attack was brought on by the exertion at work on March 28, 1991?

"A Yes, I agree."

Each material fact with supporting or conflicting evidence as presented to the courts below appears in the Appendix. 21a-36a.

B. PROCEDURAL HISTORY

As a result of the damage to his heart, Mr. Albert filed a Complaint for Damages for Personal Injuries against Southern Pacific Transportation Company under 45 U.S.C. § 51 *et seq.* On the eve of trial, the railroad moved for summary judgment asserting that "(1) plaintiff's heart attack was not reasonably foreseeable by SP and . . . (2) plaintiff cannot show by expert opinion that to a reasonable medical probability, plaintiff's heart attack was caused or contributed to by alleged negligence on SP's part." The railroad assumed its own negligence and objected to Mr. Albert's evidence on point as irrelevant. At the hearing, the railroad *twice conceded* its negligence. Yet, the superior court entered summary judgment on December 29, 1992 (13a) based on the grounds in its December 7, 1992, Order (14a-15a): (1) the railroad had no prior knowledge that Mr. Albert had "any heart problems" and (2) the sledgehammer method used was not "an inherently unsafe one." The California Court of Appeal, Second Appellate District, Division Four, affirmed that judgment *de novo* in its published Opinion filed on November 28, 1994. 1a-11a. The California Court of Appeal denied rehearing on December 21, 1994. 12a. The California Supreme Court denied review on February 23, 1995. 17a.

REASONS FOR GRANTING THE PETITION

In the superior court, the railroad argued (RT 4):

> "IF THIS WERE A BACK CASE, WOULD THIS BE A PROPER CASE FOR SUMMARY JUDGMENT[?] AND, FRANKLY, I THINK IT WOULD NOT. I THINK IF MR. ALBERT HAD RUPTURED A DISK, THE QUESTION OF FORESEEABILITY WOULD BE SUCH THAT UNDER THE LAW THAT SHOULD GO TO THE JURY."

The railroad reiterated that oral argument in the appellate court. *Accord, Stone v. New York, Chicago & St. Louis Railroad Co.*, 344 U.S. 407, 408-409 (1953) ("The likelihood of injury to men pulling or lifting beyond their capacity [during repairs] is obvious.").

Why is a ruptured disk different from a ruptured coronary artery? Given the expert medical testimony of Dr. Khan, it is not. Both conditions result from overstressing a part of the body by the inordinate and unnecessary exertion resulting from a work method that Supervisor Jerry Cain, testifying as the railroad's manager responsible for its worker, Mr. Albert, described as improper.

In this case, the railroad's abuse of "mortal clay" as an alternative to a functioning hydraulic jack was unreasonable, unsafe and unsuitable for the work required that day: replacing an extremely worn-out cross-key in an equally worn-out draft gear in an old automatic coupler on a rush basis. Dr. Khan so testified. Facts Nos. 16, 18, 19, & 21-26 (21a-36a). The California state courts cannot find otherwise as a matter of law under the FELA.

I. THIS CALIFORNIA STATE COURT OPINION, AMONG OTHERS, CREATES A BASELESS JUDICIAL EXEMPTION TO THE CLEAR LANGUAGE OF THE FELA.

Concurrent state court FELA jurisdiction exists. 45 U.S.C. § 56 (1908, amended 1948). "Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 561 (1987). "By imposing liability, FELA . . . also was meant to encourage employers to improve safety measures . . . to avoid those claims." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. ___, 114 S.Ct. 2496, 129 L.Ed.2d 427, 448 (1994). This Court has "liberally construed FELA to further Congress' remedial goal." *Id.* at 440. "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief Congress has afforded them." *Bailey v. Central Vermont Railway Co.*, 319 U.S. 350, 354 (1943).

> "Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, . . . works . . . or other equipment."

45 U.S.C. § 51 (1908, as amended 1939). Both parties agree that the railroad, Mr. Albert, and his work fall within the

FELA. They agree that he suffered his heart attack at work. They disagree on only one point: Is his first heart attack one "resulting in whole or in part from the [railroad's] negligence"?

FELA negligence, undefined by the statute, is a question of federal law. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). "Reasonable foreseeability of harm" is an essential element of FELA negligence. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 117 (1963). A railroad is liable to its employee if it " 'knew, or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect [the injured employee] and similarly situated employees." *Urie, supra*, 337 U.S. at 178.

In *Rodriguez v. Delray Connecting Railroad*, 473 F.2d 819, 819 (6th Cir. 1973) an employee "was injured while on the job during an attempt to loosen spikes with a sledge hammer type object known as a spike maul." The *Rodriguez* court concluded (*id.*, 473 F.2d 821):

> "What is 'reasonably' safe is affected to some extent by the alternatives. Here there was testimony that safety was an advantage of the hydraulic spike remover. In view of this evidence and considering the special treatment afforded F.E.L.A. cases, we cannot say that the jury was not entitled to find the old maul method 'unreasonable.' "

In *Pitt v. Pennsylvania Railroad Co.*, 66 F. Supp. 443, 445 (E.D. Pa. 1946) *affirmed*, 161 F.2d 733 (3d Cir. 1947) the court considered "whether the defendant used ordinary care to furnish plaintiff with an adequate, proper, efficient and safe tool, reasonably suitable for the plaintiff's use in the service he was directed to perform by the

defendant." Finding the railroad negligent for providing its employee with a hard steel 1½ pound ball-peen or machinist hammer (instead of a soft steel carpenter's or claw hammer) with which to drive an eight-penny nail into oak hardwood trim, the *Pitt* court explained (*id.*, 66 F. Supp. 446):

> " 'It cannot be said, as a matter of law, without reference to the use to be made of it, that because a hammer *** is a common and simple appliance, the master when furnishing it to his servant for use in the discharge of his duties, as such, does not owe to him the duty to use ordinary care to see that it is reasonably suitable and safe for the servant's use in the service to be performed by him.' "

Contributory negligence does not bar an employee's recovery. 45 U.S.C. § 53 (1908). Assumption of the risk does not bar an employee's recovery. 45 U.S.C. § 54 (1908, as amended 1939). As stated in *Owens v. Union Pacific Railroad Co.*, 319 U.S. 715, 721 (1943), however:

> "Old confusions die hard. And in this instance some refused to die at all or only did so intermittently."

"Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'." *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 58 (1943).

> "[An] FELA plaintiff need only present a minimum amount of evidence in order to defeat a motion for summary judgment. '[A] trial court is justified in withdrawing . . . issue[s] from the jury's consideration only in those extremely rare

> cases where there is zero probability either of employer negligence or that any such negligence contributed to the injury of an employee.' "

Hines v. Consolidated Rail Corp., 926 F.2d 262, 268 (3d Cir. 1991). *Accord, Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 513-514 (1957); *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 522-523 (1957); *Wilkerson v. McCarthy*, 336 U.S. 53, 60-61 (1948).

"Any . . . device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability . . . , shall to that extent be void . . . . " 45 U.S.C. § 55 (1908). The published opinion below is wrong as a matter of law.

Its position is not unique. *See, e.g.*, cases denying FELA claims related to heart injuries: *Creamer v. Odgen Railway*, 242 P.2d 575 (Utah 1952), *cert. denied*, 344 U.S. 912 (1953); *Robert v. Consolidated Rail Corp.*, 832 F.3d 3, 6 (1st Cir. 1987); *New York, New Haven & Hartford Railroad Co. v. Cragan*, 352 F.2d 463 (1st Cir. 1965), *cert. denied*, 386 U.S. 1035 (1967); *Thompson v. Tippit*, 300 S.W.2d 351, 355 (Tex. Civ. App. 1957), *cert. dismissed*, 355 U.S. 943 (1958). *See, also, Morrison v. Illinois Central Gulf Railroad Co.*, 387 So.2d 754 (Miss. 1980) (stroke).

In Russell Baker, *Growing Up* (Signet 1982) at 221, the author describes his new step-father's employment in 1939, as follows:

> "Herb did join the railroad . . . ; he was a fireman and had been for years. It was back-breaking labor . . . If you survived, and if enough engineers on the seniority ladder ahead of you keeled over with heart attacks or came down with tuberculosis or were scalded to

> death in accidents, one day they would have to call you in and tell you . . . you were going to be the man at the throttle. This was the stage at which Herb had arrived – waiting for the call . . . . He was forty-five years old."

How can a railroad employee's heart attack be "unforeseeable"?

> "The companies have no hearts, and no sensations except through their financial nerves. The only manner in which they can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care. This is not unjust to the companies."

40 Cong. Rec. 4605 (1906). Only this Court can decisively delete the baseless "one free heart attack" exemption the cases above have wrongly read into the FELA.

II. THIS SOLE PUBLISHED CALIFORNIA STATE COURT OPINION CONFLICTS WITH OTHER FEDERAL AND STATE OPINIONS BASED ON SIMILAR FACTS.

Congress intended to enact "the strongest law we can pass." 42 Cong. Rec. 4542 (1908). "It is being passed . . . in response to the demands of the laboring people of this country for remedial and protective legislation." 42 Cong. Rec. 4550 (1908). "It is not intended to exclude anyone." 42 Cong. Rec. 4541 (1908).

Reversing a railroad's summary judgment, in *Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 130 (7th Cir. 1990), the court recounts this evidence:

> "Harbin's complaint alleges that the Railroad negligently caused his heart attack. He charges the Railroad with negligence for failing to provide adequate ventilation or proper equipment with which to perform the boiler cleaning task. . . . .
>
> "Harbin proffers the testimony of a medical expert . . . to establish a link between the Railroad's negligence and his injury. At his deposition Dr. . . . testified that inhalation of particulate matter may irritate the lungs, causing impairment of oxygen in the blood stream and forcing the heart to pump at a rapid rate. Dr. . . . offered his opinion that the strenuous physical exertion involved in cleaning the boilers, compounded by the additional stress upon the heart attributable to the sooty atmosphere, precipitated Harbin's heart attack."

"Although we discern no case presenting identical facts, numerous FELA actions have been submitted to a jury based upon far more tenuous proof – evidence scarcely more substantial than pigeon bone broth." *Harbin, supra,* 921 F.2d at 132. The *Harbin* court explained (*Harbin, supra,* 921 F.2d at 131-132):

> "Harbin has adduced ample evidence bearing upon the Railroad's negligence to raise a jury question. The facts establish that locomotives emitting clouds of exhaust fumes were left running in an area with no special system of ventilation. In this same building, Harbin was directed to scrape clean boilers using a process that generated additional soot and debris. . . . Instead of utilizing an air pressure hose to disperse the thick fog of soot particles generated in the boiler cleaning process, the Railroad might have

> employed a vacuum cleaner. . . . Based upon this evidence, a jury could reasonably conclude that the Railroad's failure to employ a different boiler cleaning method or take additional precautions to ensure safety of its employees was negligent."

Holding a railroad liable for the death of its employee, in *Pierce v. Southern Pacific Transportation Co.*, 823 F.2d 1366, 1367 & 1372 n.2 (9th Cir. 1987) the court ruled based on these facts:

> "At the time of his death on November 8, 1980, William Pierce was 46 years old and had been an employee of SP for 28 years. He died because of a heart attack brought on by stress-related aggravation of a congenital heart disease known as long-QT syndrome. *Pierce was unaware of his heart condition.* [emphasis added]
>
> "The events which caused the stress and resultant heart attack occurred two days earlier. . . . .
>
> [T]he negligent conduct of an accident investigation and a decision to pull the victim from service caused him emotional distress. That distress subsequently led to his death from a heart attack, which was the physical manifestation of the extreme stress and distress caused by the Rule G accusation.
>
> ". . . . [¶] Here the cause of the injury was emotional but the plaintiff suffered a physical condition, long-QT syndrome, that made him unusually susceptible to the emotional injury. When an emotional injury causes physical manifestations of distress we can see no principled reason why the eggshell plaintiff doctrine should not apply."

Holding a railroad liable for its employee's permanent injuries, in *Bailey v. Missouri Pacific Railroad Co.*, 383 So. 2d 397, 399 (La. App.), *cert. denied*, 385 So. 2d 784 (La.), *cert. denied*, 449 U.S. 836 (1980) the court based its opinion on these findings:

> " 'A. Defendant was negligent in requiring the plaintiff to perform a two man job alone considering his age and the weather conditions.
>
> "B. This negligence caused plaintiff's heart attack and resulting damages.
>
> "C. *It was foreseeable considering plaintiff's age [58 or 59 years] and weather conditions [hot and humid] that he would suffer some sort of collapse similar to that which he experienced [on-site heat stroke followed by a myocardial infarction in the hospital two days later] as a result of this increased activity under the circumstances.* [emphasis added]
>
> "D. Plaintiff was not negligent in performing the task assigned to him which caused his collapse. He could hardly refuse to do the work he was instructed to do. The remaining crew members had other tasks to perform. . . . He could not procrastinate. . . . There was apparently no other way to perform the work assigned to him other than the way he did.' "

The *Bailey* court explained (*Bailey, supra*, 383 So. 2d 402):

> "Defendant's main argument against a finding of negligence, aside from insufficiency of the evidence, is that the plaintiff's heart attack was unforeseeable because of his unknown arteriosclerotic condition. . . .
>
> " . . . Plaintiff's heart attack and resulting injuries, while perhaps unforeseeable, were consequential to the foreseeable harm suffered

initially by defendant's negligence, i.e., collapse or heat prostration; therefore, defendant is liable in damages."

III. THIS PUBLISHED CALIFORNIA STATE COURT OPINION CAN AND SHOULD BE SUMMARILY REVERSED PER CURIAM.

Historically, this court has curtailed hostile and inaccurate state court interpretations of the FELA by summary reversal *per curiam*. *See, e.g., Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U.S. 901 (1957) and *Conner v. Butler*, 361 U.S. 29 (1959). Mr. Albert invites this Court to do so now.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgment below.

Respectfully submitted,

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May 25, 1995

APPENDIX

INDEX TO APPENDIX

Page

California Court of Appeal, Second Appellate District, Division Four, Opinion – November 28, 1994 – *Albert v. Southern Pacific Transportation Co.*, 30 Cal. App. 4th 529 (1994) 1a

California Court of Appeal Order – December 21, 1994 ..... 12a

Los Angeles County Superior Court Judgment – December 29, 1992 ..... 13a

Los Angeles County Superior Court Order – December 7, 1992..... 14a

California Supreme Court Order – February 23, 1995 ..... 17a

U.S. Const. Art. VI, cl. 2 (1787)..... 18a

U.S. Const. Amend. VII (1791)..... 18a

45 U.S.C. §§ 51-60 (1908, as amended) 19a

Plaintiff's Response in Opposition to Defendant Southern Transportation Co.'s Separate Statement of Undisputed Material Facts – October 29, 1992..... 21a

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

BERTRAND E. ALBERT, Plaintiff and Appellant, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant and Respondent.	No. B073689 (Super Ct. No. BC035177) (Filed Nov. 28, 1994)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Magaña, Cathcart & McCarthy, Brian R. Magaña and Deborah Mitzenmacher for Plaintiff and Appellant.

Lane, Powell, Spears & Lubersky and Lawrence P. Riff for Defendant and Respondent.

Bertrand E. Albert (Albert) appeals judgment entered against him in his action against Southern Pacific Transportation Company (ST or respondent) after the court granted respondent's motion for summary judgment. (Code Civ. Proc., § 437c, subd. (c).)

While working for SP on March 28, 1991, Albert, then 55 years old, suffered a heart attack. He had never experienced any symptoms or been told by any physician that there was anything wrong with his heart. Until the attack,

Albert felt "[v]ery normal." As a result, no one at SP had any knowledge of his heart condition.

Albert had been a carman for SP since 1973, working in the Cornfield Yard, where SP repairs and maintains its cars. On March 28, 1991, during the 6 a.m. safety meeting, Albert and his partner, Charlie Moten, were assigned to replace couplers and perform other repairs on a car that his supervisor wanted repaired before the SP switch engine picked up the cars between 10:30 a.m. and noon.[1]

March 28 was a "clear, sunny" day. There was nothing out of the ordinary about Albert's physical condition. Before stopping for lunch at 10:30 a.m., Albert had replaced one coupler and changed the brake shoes on one end of the car. At that time, Albert felt that everything was "[b]eautiful."

After lunch, Albert and Moten commenced work on the second coupler. They had difficulty removing the "cross key," a large cotter pin-like device that fits into a slot in the coupler. Although he had a 12-pound sledgehammer in his work cart, Albert attempted to drive the key out of its slot with the 16-pound sledgehammer as was his habit when there was a "cross key that did not want to move." Albert and Moten alternated turns using the sledgehammer. Albert swung the sledgehammer 10 times in each of 3 sets, while Moten did not swing it as many times.

While Albert was working on the coupler, Johnny Juarez, the foreman, noticed that they were not having

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[1] Such a car is called a "hot car."

success with the sledgehammer and he suggested that it would be easier to use a forklift and chain to finish the job. Juarez then left and the forklift driver was summoned to remove the cross key.

Juarez returned to the car after the cross key had been removed. He monitored the progress made by Albert. Albert said seeing his supervisor there "kind of made me nervous in a way" knowing that the job was to be completed by noon.

After removing the worn cross key, the forklift driver delivered a replacement. They could not insert the new cross key into the coupler. Albert and Moten repeated their process of alternating in hitting the cross key with the sledgehammer. Again the cross key was struck about 30 times by Albert and about 10 times by Moten. They were not successful. The forklift driver was again summoned to remove the new cross key, have it ground to remove a burr that had formed on it, and returned to the car.

After the forklift driver repositioned the cross key, Albert hit it another 15 times in about 25 seconds, but with no success. At that point, Albert felt tired, but not ill. The forklift was used to pound the cross key in. On the drive to the locker room, at about 12:55 p.m., Albert experienced the onset of the heart attack symptoms.

On August 14, 1991, Albert filed a complaint against respondent in which he alleged a cause of action for negligence pursuant to the Federal Employers Liability Act (FELA). Respondent answered and then moved for summary judgment on the grounds that (1) Albert's heart attack was not foreseeable by SP, and (2) Albert could not

show by expert opinion that, to a reasonable medical probability, Albert's heart attack was caused by SP's negligence. The court granted the motion and entered judgment for respondent.[2] This appeal followed. We affirm.

A motion for summary judgment shall be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 473c, subd. (c).) When the defendant is the moving party, summary judgment is proper if the defendant demonstrates the absence of an essential element of the plaintiff's case. (*Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 266.) In the instant case, the trial court granted summary judgment on the grounds that, as a matter of law, Albert's heart attack was unforeseeable, thus negating an essential element of his negligence action. Our review of this determination is *de novo*. (*Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 430.)

Under FELA a railroad employer is "liable in damages to any person suffering injury while he is employed by such employer" for such injury or death resulting in whole or in part caused by the employer's negligence. (45 U.S.C., § 51.) Thus, the FELA plaintiff "must show both negligence on the part of the employer and causation." (*Heater v. Chesapeake and Ohio Railway Company* (7th Cir.

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[2] Albert objected to certain deposition testimony of himself, Johnny Juarez and Jeffrey Cain introduced in support of the motion. The trial court impliedly overruled his objections. He renews them on appeal. We have considered and also overrule those objections.

1974) 497 F.2d 1243, 1246.) The plaintiff must make out a prima facie case of negligence on the part of the employer, including the element of reasonable foreseeability. (*Gallick v. Baltimore & Ohio R.R. Co.* (1963) 372 U.S. 108, 117 ["reasonable foreseeability of harm is an essential ingredient of [FELA] negligence [Citations.]"].) "To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. [Citations.] The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances. [Citation.]" (*Davis v. Burlington Northern, Inc.* (8th Cir. 1976) 541 F.2d 182, 185; *Dale v. Baltimore & Ohio R. Co.* (Pa. 1989) 552 A.2d 1037, 1038 ["a plaintiff must establish, *inter alia,* that the employer could have foreseen that injury to the employee was likely or reasonably probable. . . . "].) Although foreseeability is ordinarily a question of fact for the jury, it can be decided as a matter of law when "reasonable minds cannot disagree on the propriety of the [trial] court's resolution of the issue." (*Id.* at p. 1040.)

Relevant authority holds that a railroad employer cannot be held liable under FELA for a heart attack suffered by its employee in the regular course of his employment when neither the railroad nor the employee had any reason to believe that the employee had a heart condition. Under these circumstances, the injury was not reasonably foreseeable. (*Robert v. Consolidated Rail Corp.* (1st Cir. 1987) 832 F.2d 3, 5-7; *Morrison v. Illinois Cent. Gulf R. Co.* (Miss. 1980) 387 So.2d 754, 756; *Thompson v. Tippit* (Tex. App. 1957) 300 S.W.2d 351, 355-358; *Creamer v.*

Ogden Union Railway & Depot Co. (Utah 1952) 242 P.2d 575, 577-578.)

In *Robert*, the plaintiff alleged that he suffered an off-the-job heart attack as the result of an extended period of on-the-job harassment by his supervisors. Conrail moved for summary judgment on the grounds that the plaintiff's heart attack was unforeseeable because he had never previously experienced symptoms of heart trouble, had not complained about the harassment or related stress and had not alleged that Conrail negligently failed to stop the harassment. (*Robert v. Consolidated Rail Corp., supra*, 832 F.2d at p. 5.) The trial court granted summary judgment and the plaintiff appealed.

On appeal, while acknowledging the broad remedial purpose of FELA, the reviewing court upheld the summary judgment because the plaintiff's "case is lacking as to proof of foreseeability. . . . [T]he record fails to show that Conrail knew or should have known of the possibility that its conduct toward Robert would cause him to suffer a heart attack. We would have a much different case if Conrail, knowing of appellant's heart condition, acted negligently toward Robert." (*Robert v. Consolidated Rail Corp., supra*, 832 F.2d at p. 6, fn. omitted.) The court concluded that the plaintiff "failed to establish that Conrail could or should reasonably have foreseen that he would suffer a heart attack from stress of which Conrail was never informed." (*Id.* at p. 7.)

Similarly, in *Morrison*, the reviewing court upheld a directed verdict where the plaintiff, who suffered an on-the-job stroke, claimed that the railroad was negligent in failing to restrict his duties to avoid the possibility of a

stroke or heart attack when there was no evidence that he suffered from a medical condition that might induce a stroke or heart attack. (*Morrison v. Illinois Cent. Gulf R. Co., supra,* 387 So.2d at p. 756.)

In *Thompson,* the plaintiff suffered from an arterial condition that made him susceptible to heart attack but neither he nor his employer, the railroad company, was aware of it. While engaged in heavy physical exertion, the plaintiff sustained a heart attack and subsequently brought a suit against the railroad under FELA. The jury returned a verdict in his favor. The railroad appealed and the judgment was reversed on the grounds that the evidence failed to support a finding of negligence because "the record is still devoid of any evidence from which it may be fairly said that the defendant was charged with notice of any fact or facts from which *the heart attack* which plaintiff sustained could be anticipated as a result of the work to which he was assigned." (*Thompson v. Tippit, supra,* 300 S.W.2d at p. 355, original italics.)

Finally, in *Creamer,* cited by the court below in support of its decision, the reviewing court reversed a judgment in favor of a plaintiff who suffered an on-the-job heart attack while in the course of his employment because of a latent rheumatic heart condition of which neither he nor the railroad was aware. At trial, the plaintiff argued that the railroad was negligent in failing to supply him with equipment that would have eliminated the necessity of any physical exertion on his part. The court rejected the argument, holding that to impose liability based on a physical condition known neither to the employee nor the employer "is to predicate negligence on some elusive quality of clairvoyance quite inconsistent

with principles of reasonable foreseeability. (*Creamer v. Ogden Union Railway & Depot Co., supra,* 242 P.2d at p. 577, fn. omitted.)

By contrast, in *Stewart v. Alton and Southern Ry. Co.* (Mo.App. E.D. 1993) 849 S.W.2d 119, the plaintiff alleged that his on-the-job heart attack was due to verbal harassment by his supervisor. The evidence showed that the employee had complained to the supervisor of pain and that he was known by the supervisor to suffer from high blood pressure. Under such circumstances, the reviewing court held that foreseeability was established by the employee's "[p]rotestations of discomfort. . . . " (*Id.* at p. 126.)

What these cases establish is the principle that liability may not be imposed on a railroad under FELA when an employee suffers a heart attack in the ordinary course of his employment where neither he nor the railroad have any notice of heart trouble and the employee has not complained of discomfort or pain prior to the heart attack. Under such circumstances, the injury is not reasonably foreseeable as a matter of law. Absent foreseeability, negligence is not established under FELA and without a showing of negligence, recovery is not permitted. (*Robert v. Consolidated Rail Corp., supra,* 832 F.2d at p. 6 ["FELA does not impose strict liability on employers."].)

In the instant case, the evidence shows that neither Albert nor SP was aware that he suffered from any kind of heart trouble nor did he complain of pain or discomfort prior to his heart attack. Moreover, contrary to Albert's assertions on appeal, there is no support in the

record for the claim that he was subjected to any unusual stress to get the job done nor that the weather was unseasonably hot. Based on the evidence adduced below, it was not reasonably foreseeable to SP that Albert would suffer a heart attack in the performance of his regular duties and, therefore, SP was not negligent.

In the court below, and at oral argument, Albert contended that SP's failure to provide him with a functional hydraulic jack, as an alternative to a sledgehammer, to remove the cross key arguably violated its duty to provide him with proper tools, and liability could be assessed against SP on this ground. The argument is without merit.

In the first place, as the trial court found, the failure to provide an employee with alternative means to do his job is not negligence unless the means provided are inherently unsafe. (*Soto v. Southern Pacific Transp. Co.* (5th Cir. 1981) 644 F.2d 1147, 1148.) There was no such showing made here. The only evidence introduced by Albert was a fragment of deposition testimony by one Jeffrey Cain that he would have advised use of a hydraulic jack rather than a sledgehammer to remove the cross key but Cain was not a percipient witness nor, apparently, was he qualified as an expert. By contrast, Albert himself testified that he used the sledgehammer "[w]henever we had a cross key that did not want to move."[3] Accordingly, Albert failed to make a showing that use of the sledgehammer was inherently unsafe.

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[3] Bizarrely, having raised this issue before, Albert argues on appeal that the court denied him due process by making a finding on it. There is no merit to this claim.

In any event, whether SP should have provided Albert with an alternative to the sledgehammer still requires a showing that a heart attack was a foreseeable consequence of his use of the sledgehammer. This simply has not been established. In essence, the same argument that Albert makes now was made by the plaintiffs in *Morrison* and *Creamer.* where it was argued that the railroad was negligent in failing either to have restricted their duties (*Morrison v. Illinois Cent. Gulf R. Co., supra,* 387 So.2d at p. 756), or provided them with equipment that would have minimized physical exertion (*Creamer v. Ogden Union Railway & Depot Co., supra,* 242 P.2d at pp. 577-578). In each case the court rejected the argument because of the unforeseeability of the stroke (*Morrison*) or heart attack (*Creamer*). Similarly, because it was not foreseeable to SP that Albert might suffer a heart attack as the result of the physical exertion involved in his job, its failure to provide him with a hydraulic jack or some other means of doing his job was not negligence.

Equally without merit is Albert's repeated assertion that SP is liable for his injury even though other causes may have contributed to it. This contention confuses causation with negligence, which Albert is also required to prove. (*Heater v. Chesapeake and Ohio Railway Company, supra,* 497 F.2d at p. 1246.) The fact that his employment may have been a cause of his heart attack does not make SP liable for his injury in the absence of proof of its negligence. It was the absence of negligence, not causation, that supports summary judgment in this case.

Finally, we have read and considered the two decisions on which Albert principally relies for the proposition that this heart attack was foreseeable. (*Pierce v.*

Southern Pacific Transp. Co. (9th Cir. 1987) 823 F.2d 1366, and *Bailey v. Missouri Pac. R. Co.* (3d Cir. 1980) 383 So.2d 397.) Both *Pierce* and *Bailey* are legally and factually distinguishable from the instant case.

The judgment is affirmed. SP to have its costs on appeal.

CERTIFIED FOR PUBLICATION.

WOODS (Arleigh), P.J.

We concur:

VOGEL (C.S.), J.

HASTINGS, J.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 12/21/94

Magana, Cathcart & Mccarthy
Brian R. Magana
1801 Avenue of the Stars
Suite 810
Los Angeles, CA. 90067

RE: Albert, Bertrand E.
vs.
Southern Pacific Transportation Co.
2 Civil B073689
Los Angeles NO. BC035177

THE COURT:

Petition for rehearing denied.

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Attorneys for Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BERTRAND E. ALBERT, Plaintiff, v. SOUTHERN PACIFIC TRANSPORTATION CO., Defendant.	CASE NO. BC 035 177 JUDGMENT (C.C.P. §437c) [PROPOSED] (Filed Dec. 29, 1992)

This court, having on December 7, 1992, granted Defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY'S Motion for Summary Judgment, and having ordered entry of judgment as requested in said Motion:

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff, BERTRAND E. ALBERT shall take nothing, and that defendant, SOUTHERN PACIFIC TRANSPORTATION, shall recover from plaintiff costs of suit herein in the amount of $_____.

DATED: Dec. 29, 1992

/s/ Judge David P. Yaffe
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: December 7, 1992	)	**T. Acuna,**
Honorable David P. Yaffe,	)	*Deputy Clerk*
Judge	)	**None** *(C.S.R.)*
12. A. Ayala,	)	
C.S.L.		

(Parties and Counsel checked if present)

BC035177

Counsel For
Plaintiff:
BRIAN MAGANA

ALBERT, BERTRAND E.
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Counsel For
Defendant:
LAWRENCE P. RIFF

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT.

Motion for Summary Judgment having been taken under submission on December 2, 1992, the court rules as follows:

Motion is granted.

Evidence is adduced in support of the motion that plaintiff's heart attack was not foreseeable by defendant. That evidence consists of plaintiff's deposition testimony that he had no reason to suspect before the heart attack that

there was anything wrong with his heart, and the deposition testimony of defendant's foreman and manager to the effect that they had no knowledge that plaintiff had any heart problems before he suffered his heart attack. Plaintiff produces no contrary evidence to create a triable issue of fact, but relies instead on the contention that because plaintiff was 57 years old and had been a smoker it was reasonably foreseeable that he would suffer injury if required to do the strenuous work of the type he was performing when he sustained his heart attack. Such contention has been rejected on the ground that to accept it, "is to predicate negligence on some elusive quality of clairvoyance quite inconsistent with principles of reasonable foreseeability." *Creamer v. Ogden Union Railway*, 242 P2d 575, 577 (Utah Sup Ct, 1952).

Although it is true that foreseeability is *ordinarily* a triable issue, it may be decided as a question of law if, under the undisputed facts, there is no room for a *reasonable* difference of opinion. The evidence in support of the motion shows the absence of any reasonable difference of opinion, to the extent that it is possible to prove such a negative.

Plaintiff has come forth with no controverting evidence, except that one witness Jeffrey L. Cain, testified that if he had been present he would have recommended the use of a jack to do the work instead of a sledge hammer. Plaintiff argues that such evidence creates a triable issue as to the existence of a "threshold tort", and that any damages flowing from it are recoverable. However, the fact that there were other, more advanced methods that could have been used to do the work is of no significance where

the method used was not an inherently unsafe one. *Soto v. Southern Pacific,* 644 F2d 1147, 1148 (5th Cir. 1981).

In granting this motion the court does *not* adopt defendants' argument that it may base its motion upon a failure by plaintiff to demonstrate that he can support his claim. Under California practice it is the defendant who must affirmatively prove that plaintiff does not have a case, but defendant has met that burden here.

Counsel for defendant to prepare the judgment, serve opposing counsel and the court. The court will hold for ten days prior to signing and filing.

The Court orders the Final Status Conference and Jury Trial off calendar as moot.

A true copy of this minute order is mailed via U.S. Mail this date to counsel as follows:

Brian Magana, Esquire
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Lawrence P. Riff, Esquire
333 South Hope Street
Suite 2400
Los Angeles CA 90071

Second Appellate District, Division Four,
No. B073689 – S044229

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

(Filed Feb. 23, 1995)

BERTRAND E. ALBERT, Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Respondent

Appellant's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. ART. VI, CL. 2 (1787)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

U.S. CONST. AMEND. VII (1791)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL EMPLOYERS' LIABILITY ACT
TITLE 45 – RAILROADS
CHAPTER 2 – LIABILITY FOR INJURIES TO EMPLOYEES
45 U.S.C. §§ 51-60 (1908, as amended)

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaged in commerce between any of the several States . . . , shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . , for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . . . (Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

§ 53. Contributory negligence; diminution of damages

In any actions . . . brought against any such common carrier by railroad under or by virtue of any provisions of this chapter to recover damages for personal injuries to an employee . . . , the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . . (Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any provisions of this chapter to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case, where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee. (Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . . (Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BERTRAND E. ALBERT, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION CO., Defendant.	CASE NO. BC 035 177 PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT SOUTHERN PACIFIC TRANSPORTATION CO.'S SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS DATE: Nov. 12, 1992 TIME: 8:30 a.m. DEPT: 68 DISCOVERY CUTOFF: None MOTION CUT-OFF: 10/30/92 TRIAL DATE: Dec. 14, 1992 (Filed Oct. 29, 1992)

Plaintiff BERTRAND E. ALBERT submits this opposing response under Cal. Civ. Proc. Code § 437c(b) (1990) to the separate statement of undisputed material facts submitted by defendant SOUTHERN PACIFIC TRANSPORTATION CO.:

DEFENDANT'S FACTS:	RESPONSE:
1. Plaintiff was not aware that he suffered from any heart ailments or infirmities prior to his heart attack on March 28, 1991.	UNDISPUTED. The phrase "prior to his heart attack," however, is vague and ambiguous. Cal. Evid. Code § 350.
2. No doctor had ever told plaintiff he had any heart problems prior to the date of his heart attack.	UNDISPUTED.
3. Plaintiff felt fine the day of his heart attack prior to the heart attack occurring.	Albert Depo. EX A 46:13-20 & 51:23-52:5. DISPUTED. Khan Depo. EX 1 59:17-19 & 45:13-23; Albert Depo. EX 2 46:5-7, 64:19-24, 72:4-5, 73:8-9 & 15-17, 73:18-74:1, 74:5-75:1, 75:11-14 & 24-25, & 76:1-2.
4. Plaintiff felt fine even while performing his duties prior to his heart attack occurring.	Albert Depo. EX A 61:19-62:5 & 63:5-8. DISPUTED. Kahn Depo. EX 1 59:17-19 & 45:13-23; Albert Depo. EX 2 46:5-7, 64:19-24, 72:4-5, 73:8-9 & 15-17, 73:18-74:16. The phrase "prior to his heart attack occurring" is vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code §350.

5.	Jerry Cain, plaintiff's manager, was not aware that plaintiff had any heart problems prior to plaintiff's March 28, 1991 heart attack.	Cain Depo. EX E 42:16-22. DISPUTED. Albert Depo. EX 2 7:25-8:1, 23:11-13, 28:7-9 & 47:2-10; Khan Depo. EX 1 20:8-11, 21:5-6 & 55:15-56:13.
6.	John Juarez, Plaintiff's foreman, was not aware that plaintiff had any heart problems prior to plaintiff's March 28, 1991 heart attack.	Juarez Depo. EX D 48:7-19. DISPUTED. Albert Depo. EX 2 59:7-9, 60:6-12, 64:4-7, 66:16-23, 67:2-6, 71:1-11, 72:4-5 & 74:1-7; Albert Depo. EX 2 7:25-8:1, 23:11-13, 28:7-9 & 47:2-10; Khan Depo. EX 1 20:8-11, 21:5-6 & 55:15-56:13. The phrase "prior to plaintiff's . . . heart attack" is vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code § 350.
7.	Plaintiff had no significant history to indicate a pending heart attack.	Khan Depo. EX F 18:7-11. DISPUTED. Albert Depo. EX 2 7:25-8:1, 23:11-13, 28:7-9 & 47:2-10; Khan Depo. EX 1 20:8-11, 21:5-6 & 55:15-56:13. The phrase "significant history" is vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code §350. Defendant did not establish that the witness has personal knowledge on

		point as required by Cal. Evid. Code §702(a); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204(1). Hearsay is not admissible. Cal. Evid. Code §1200. Moreover, the conflict between the "no significant PMH" entry in the hospital admission records and the "signficant past medical history" entry on the hospital discharge summary evidence at Khan Depo. EX F 17:22-18:8 creates a triable issue of material fact.
8.	Plaintiff had never suffered prior chest pains.	Kahn Depo. EX F 19:6-18. DISPUTED. Defendant did not establish that the witness has personal knowledge on point as required by Cal. Evid. Code §702(a); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204(1). Hearsay is not admissible. Cal. Evid. Code §1200.
9.	Plaintiff had no indication of heart disease prior to the day his heart attack occurred.	Khan Depo. EX F 21:7-16. DISPUTED. Albert Depo. EX 2 7:25-8:1, 23:11-13, 28:7-9 & 47:2-10; Khan Depo. EX 1 20:8-11, 21:5-6 & 55:15-56:13. The phrase "indication of heart disease" is vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code §350.

10.	Plaintiff had never suffered any angina.	Khan Depo. EX F 50:10-22. DISPUTED. Defendant did not establish that the witness has personal knowledge on point as required by Cal. Evid. Code §702(a); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204(1). Hearsay is not admissible. Cal. Evid. Code §1200.
11.	It cannot be predicted when someone is going to have a heart attack.	Khan Depo. EX F 53:23-24. DISPUTED. Khan Depo. EX 1 20:8-11, 21:5-6, 52:8-12, 54:7-15 & 55:15-56:13. The terms "when" and "someone" are vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code §350. Defendant did not establish that the witness had expertise on point as required by Cal. Evid. Code §§702(a), 720(a) & 801(b); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204. See also, Evidentiary Objections to Khan Depo. EX F.
12.	Plaintiff showed no symptoms to indicate he could not reasonably be expected to carry on strenuous activity the day his heart attack occurred.	Khan Depo. EX F 73:2-13. DISPUTED. Albert Depo. EX 2 7:25-8:1, 23:11-13, 28:7-9 & 47:2-10; Khan Depo. EX 1 20:8-11, 21:5-6, 55:15-56:13 & 57:2-58:7. The phrase "no

		symptoms to indicate" is vague and ambiguous, hence, irrelevant and inadmissible. Cal. Evid. Code §350. Defendant did not establish that the witness has personal knowledge on point as required by Cal. Evid. Code §702(a); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204(1). Hearsay is not admissible. Cal. Evid. Code §1200. Defendant did not establish that the witness has expertise on point as required by Cal. Evid. Code §§702(a), 720(a) & 801(b); Cal. Civ. Proc. Code §437c(d) & L.D.P.M. ¶204. See evidentiary Objections to Khan Depo. EX F.
13.	Plaintiff's heart attack could have occurred without the exertion he performed at work the day of his heart attack.	Khan Depo. EX F 53:25-54:6. DISPUTED. Khan Depo. EX 1 52:8-12 & 54:7-15. This fact is not material. The phrase "could have" is vague and ambiguous, hence irrelevant and inadmissible. Cal. Evid. Code §350. Defendant did not establish that the witness has expertise on point as required by Cal. Evid. Code §§702(a), 720(a) & 801(b); Cal. Civ. Proc. Code §437c(d) &

	L.D.P.M. ¶204. See, also, Evidentiary Objections to Khan Depo. EX F.
14. Plaintiff's treating cardiologist cannot testify that to a reasonable medical probability, plaintiff's activities of March 28, 1991 caused or contributed to his heart attack.	Khan Depo. EX F 52:20-54:20. DISPUTED. Khan Depo. EX 1 50:2-5 & 13-17, 51:23-24, 52:8-12, 54:8-15 & 57:2-58:7. As stated, this fact is not material. This fact mischaracterizes Dr. Khan's testimony and misstates the applicable F.E.L.A. legal standard. See, Evidentiary Objections to Khan Depo. EX F.
FURTHER UNDISPUTED FACTS:	SUPPORTING EVIDENCE:
15. On March 28, 1991, plaintiff ALBERT was a 55.5 year-old male.	Albert Depo. EX 2 7:25-8:1 & 23:11-13.
16. Males are more prone to coronary artery disease than females.	Khan Depo. EX 1 21:5-6; Cal. Evid. Code §451(f).
17. Plaintiff ALBERT smoked cigarettes at defendant's cornfield yard.	Albert Depo. EX 2 47:2-8.
18. Smoking is one risk factor in coronary artery disease.	Khan Depo. EX 1 20:8-10.

19.	A person 55.5 years old is more at risk of having a myocardial infarction than a person who is younger.	Khan Depo. EX 1 60:16-23; Cal. Evid. Code §451(f).
20.	Dr. Nelson, *not* Dr. Khan, is plaintiff ALBERT's regular family doctor.	Albert Depo. EX 2 28:7-11.
21.	A mycocardial [sic] infarction or heart attack is an evolving process, occurring over a period of time.	Khan Depo. EX 1 59:17-19.
22.	A heart attack is death or damage to the heart muscle caused by an insufficiency of blood to that muscle resulting from a blockage of the blood vessel supplying the heart muscle.	Khan Depo. EX 1 45:13-23.
23.	Arteriosclerotic heart disease among American males is common.	Khan Depo. EX 1 55:15-23; Cal. Evid. Code §451(f).
24.	Arteriosclerotic heart disease is common in asymptomatic American males over the age of 18.	Khan Depo. EX 1 55:15-56:13; Cal. Evid. Code §451(f).

25.	Exercise or physical exertion substantially increases the risk of a myocardial infarction, especially in one who has pre-existing heart damage or heart disease.	Khan Depo. EX 1 57:2-58:7.
26.	To a reasonable medical or scientific probability plaintiff ALBERT's physical exertion at work on March 28, 1991 caused his heart attack.	Khan Depo. EX 1 50:2-5 & 13-17, 51:23-24, 52:8-12, 54:8-10 & 57:2-58:7.
27.	At the 6:00 a.m. safety meeting on March 28, 1991, SOUTHERN PACIFIC foreman John Juarez told plaintiff ALBERT that he must complete all of the repairs on his assigned "hot car" that morning before the switch engine arrived between 10:30 a.m. and about 12:00 noon.	Albert Depo. EX 2 39:4-12 & 19-23; 40:3-18, 42:3-12 & 19-25, 43:7-9 & 16-19.
28.	SOUTHERN PACIFIC foreman John Juarez stood over plaintiff ALBERT on March 28, 1991, making him nervous and pushing him to complete the repairs rapidly.	Albert Depo. EX 2 71:1-11 & 72:4-5.

29.	Charlie Moten, the only SOUTHERN PACIFIC employee assigned by SOUTHERN PACIFIC to help plaintiff ALBERT, was even *older* than plaintiff ALBERT.	Albert Depo. EX 2 49:8-11, 53:9-12 & 44:2-4 & 10-12.
30.	As SOUTHERN PACIFIC foreman John Juarez knew, plaintiff ALBERT alone performed all of the repairs at one end of his assigned "hot car" on March 28, 1991, between 9:30 a.m. and 10:30 a.m.	Albert Depo. EX 2 48:19-25, 49:12-25, 50:1-12 & 15-22, 51:1-6, 59:7-9 & 60:6-12.
31.	As SOUTHERN PACIFIC foreman John Juarez saw for himself, plaintiff ALBERT, racing to repair the "hot car" before the switch engine arrived, rapidly swung the 16-pound sledgehammer repeatedly (about 30 times) on March 28, 1991, after 11:30 a.m. while trying to remove the old cross-key from the second railcar coupler.	Albert Depo. EX 2 52:6-16, 53:6-8 & 12-22, 57:23-58:1, 59:1-3 & 60:6-8.

32.	The old cross-key was very hard to remove from the second railcar coupler because the old cross-key was worn and indented with the slack outward plus the draft gear holding it [sic] place was no good, all worn out.	Albert Depo. EX 2 56-7-13, 56:20-57:2 & 77:23-78:3.
33.	SOUTHERN PACIFIC foreman John Juarez instructed plaintiff ALBERT to have a forklift called Big Red No. 3 chained to the old cross-key to yank it out.	Albert Depo. EX 2 59:7-9 & 60:6-14.
34.	As SOUTHERN PACIFIC foreman John Juarez saw for himself, plaintiff ALBERT, racing to repair the "hot car" before the switch engine arrived, rapidly swung the 16-pound sledgehammer repeatedly (about 30 times) on March 28, 1991, after 11:30 a.m. thereby inserting the new cross-key only halfway into the second railcar coupler before it stuck.	Albert Depo. EX 2 62:23-63:4, 63:9-11 & 22-24, 64:4-7 & 13-23, & 65:4-6 & 11-3.

35.	The forklift called Big Red No. 3 pulled out the half-installed new cross-key and some SOUTHERN PACIFIC employee had to grind off a burr on the "too tight" new cross-key.	Albert Depo. EX 2 64:15-20.
36.	As SOUTHERN PACIFIC Foreman John Juarez saw for himself, plaintiff ALBERT, racing to repair the "hot car" before the switch engine arrived, rapidly swung the 16-pound sledgehammer repeatedly (about 15 times) in 25 seconds on March 28, 1991, after 11:30 a.m., thereby inserting the new cross-key three-fourths of the way into the second railcar coupler before he put down the sledgehammer.	Albert Depo. EX 2 64:4-7 & 20-23, 66:19-67:6, 70:8-10 & 16-25, 71:1-11 & 72:4-5.
37.	SOUTHERN PACIFIC foreman John Juarez ordered the forklift called Big Red No. 3 to finish pushing the new cross-key the	Albert Depo. EX 2 73:19-22.

remaining one-fourth of the way into the second railcar coupler.

38. When plaintiff ALBERT put down the 16-pound sledgehammer, he felt very tired and very, very weak.

Albert Depo. EX 2 64:22-24, 73:8-9, 73:19-25, 74:13-16.

39. Despite plaintiff ALBERT's obviously weak condition, SOUTHERN PACIFIC foreman John Juarez assigned plaintiff ALBERT more work.

Albert Depo. EX 2 74:5-12.

40. At about 12:00 – 12:15 p.m. on March 28, 1991, plaintiff ALBERT, entered the bathroom at cornfield yard where he remained extremely tired and weak, had stomach cramps, and broke into a cold sweat.

Albert Depo. EX 2 74:18-25; Juarez Depo. EX 3 28:6-9.

41. The paramedics arrived at cornfield yard and took plaintiff ALBERT directly to the hospital where he first saw Dr. Khan.

Albert Depo. EX 2 75:24-76:2.

42.	Defendant SOUTHERN PACIFIC's use of the forklift called Big Red No. 3 on March 28, 1991, as ordered by SOUTHERN PACIFIC foreman John Juarez, created a dangerous condition in plaintiff BERTRAND E. ALBERT's assigned workplace.	Cain depo. EX 4 36:7-16.
43.	Instead of having plaintiff ALBERT 16-pound sledgehammer to the point of having a heart attack, SOUTHERN PACIFIC could have burned out the old draft gear replaced it with a new one, but this procedure would have taken two hours or more.	Albert Depo. EX 2 59:5-9 & 17-19, 60:1-2, 77:16-19 & 78:2-7.
44.	Instead of having plaintiff ALBERT 16-pound sledgehammer to the point of having a heart attack, SOUTHERN PACIFIC could have positioned the railcar needing rapid repair where a rabbit or an engine could have been	Albert Depo. EX 2 76:13-17 & 77:8-15.

brought in to compress the old draft gear to ease the cross-key movements.

45. Defendant SOUTHERN PACIFIC should have provided plaintiff BERTRAND E. ALBERT with a functional hydraulic jack on March 28, 1991, with which to compress the draft gear; it did not.

Cain Depo. EX 4 35:20-25 & 27:17-25; Declaration of Bertrand E. Albert.

46. Despite seeing plaintiff ALBERT 16-pound sledgehammering rapidly and repeatedly under the hot sun to get the "hot car" repaired before the switch engine arrived, SOUTHERN PACIFIC foreman John Juarez did *not* order plaintiff ALBERT, who has only a sixth-grade formal education, to slow down or use an easier way.

Albert Depo. EX 2 9:14-16, 66:16-67:6 & 71:1-3; Juarez Depo. EX 3 42:11-13.

47. Physical exertion under the hot sun increases the risk of myocardial infarction.

Khan Depo. EX 1 73:18-74:5.

48. Plaintiff ALBERT returned to work at the same job at cornfield yard three months after his heart attack.	Albert Depo. EX 2 78:22-24 & 80:14-81:1.

FURTHER DISPUTED FACTS:	CONFLICTING EVIDENCE:
49. Whether, under the circumstances of this case, SOUTHERN PACIFIC TRANSPORTATION CO.'s conduct constitutes F.E.L.A. negligence.	Facts 1-14 with supporting evidence versus Facts 1, 2 and 15-48 with supporting evidence.
50. Whether, under the circumstances of this case, SOUTHERN PACIFIC TRANSPORTATION CO.'s F.E.L.A. negligent conduct F.E.L.A. proximately caused plaintiff BERTRAND E. ALBERT's heart attack.	Facts 1-14 with supporting evidence versus Facts 1, 2 and 15-48 with supporting evidence.

DATED: October 27, 1992.

Respectfully submitted,

MAGAÑA, CATHCART & McCARTHY

By /s/ Brian R. Magaña
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